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9 Attorneys for Defendants:
10 OFELIA ABAYA and BO MCSWINE dba BO'S BARBECUE
AND CATERING RESTAURANT

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14 Attorney for Defendants
15 ANTHONY LUKASZEWSKI and
MAUREEN LUKASZEWSKI

16 UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

17 DERRICK ROSS,
18 Plaintiff,

CASE NO. C07-0888 BZ
Civil Rights

19 v.

**CONSENT DECREE AND ~~PROPOSED~~
ORDER**

20 RICK DUDUM; JEFF DUDUM;
21 MARY DUDUM; OFELIA ABAYA
dba BO'S BARBECUE AND
22 CATERING RESTAURANT; BO
MCSWINE; ANTHONY
23 LUKASZEWSKI; MAUREEN
LUKASZEWSKI; and DOES 1-25,
Inclusive,
Defendants.

24 _____ /
25 **CONSENT DECREE AND ORDER**

26 1. Plaintiff DERRICK ROSS filed a Complaint in this action on February 12,
27 2007, to enforce provisions of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C.
28 §§ 12101 et seq., and California civil rights laws against Defendants, RICK DUDUM; JEFF

1 DUDUM; MARY DUDUM; OFELIA ABAYA dba BO'S BARBECUE AND CATERING
2 RESTAURANT; BO MCSWINE; ANTHONY LUKASZEWSKI; MAUREEN
3 LUKASZEWSKI; and DOES 1-25, Inclusive. Plaintiff has alleged that Defendants violated
4 Title III of the ADA and sections 51, 52, 54.1, and 55 of the California Civil Code, and sections
5 19955 et seq., of the California Health and Safety Code by failing to provide full and equal
6 access to their facilities at the Bo's Barbecue and Catering Restaurant located at 3422 Mt.
7 Diablo Blvd., Lafayette, California, when plaintiff visited the subject facility on August 12,
8 2006.

9 2. Defendants RICK DUDUM; JEFF DUDUM; MARY DUDUM; OFELIA
10 ABAYA dba BO'S BARBECUE AND CATERING RESTAURANT; BO MCSWINE;
11 ANTHONY LUKASZEWSKI; MAUREEN LUKASZEWSKI ("Defendants") deny the
12 allegations in the Complaint and by entering into this Consent Decree do not admit liability to
13 any of the allegations in Plaintiff's Complaint filed in this action. The parties hereby enter into
14 this Consent Decree for the purpose of resolving this lawsuit without the need for protracted
15 litigation, and without the admission of any liability.

16 3. The parties agree that Defendants RICK DUDUM; JEFF DUDUM; AND
17 MARY DUDUM are not currently owners of the property at which the Bo's Barbecue and
18 Catering Restaurant that is the subject of this action is located. Therefore, they are not legally
19 able to perform remedial or corrective work on the property or otherwise to comply with the
20 provisions of this Consent Decree ordering injunctive relief.

21 **JURISDICTION:**

22 4. The parties to this Consent Decree agree that the Court has jurisdiction of this
23 matter pursuant to 28 USC §1331 for alleged violations of the Americans with Disabilities Act
24 of 1990, 42 USC 12101 *et seq.* and pursuant to supplemental jurisdiction for alleged violations
25 of California Health & Safety Code §19955 *et seq.*, including §19959; Title 24 California Code
26 of Regulations; and California Civil Code §§51; 52; 54; 54.1; §54.3; and 55.

27 5. In order to avoid the costs, expense, and uncertainty of protracted litigation, the
28 parties to this Consent Decree agree to entry of this Order to resolve all claims regarding

**Consent Decree and Order: Case No. C07-
0888 BZ**

1 injunctive relief raised in the Complaint filed with this Court. Accordingly, they agree to the
2 entry of this Order without trial or further adjudication of any issues of fact or law concerning
3 plaintiff's claims for injunctive relief.

4 WHEREFORE, the parties to this Consent Decree hereby agree and stipulate to the
5 Court's entry of this Consent Decree and Order, which provides as follows:

6 **SETTLEMENT OF INJUNCTIVE RELIEF:**

7 6. This Consent Decree and Order shall be a full, complete, and final disposition
8 and settlement of Plaintiff's claims against all Defendants for injunctive relief that have arisen
9 out of the subject Complaint. The parties agree that there has been no admission or finding of
10 liability or violation of the ADA and/or California civil rights laws, and this Consent Decree
11 and Order should not be construed as such.

12 7. The parties agree and stipulate that the corrective work will be performed in
13 compliance with the standards and specifications for disabled access as set forth in the
14 California Code of Regulations, Title 24-2 and Americans with Disabilities Act Accessibility
15 Guidelines, unless other standards are specifically agreed to in this Consent Decree and Order.

16 a) Remedial Measures: The remedial measures agreed upon by the Parties
17 are as specified in **Attachment A** to this Consent Decree, which Attachment consists of
18 drawings prepared by defendant's expert Peter Margen and a list of additional items prepared
19 by plaintiff's expert Barry Atwood. **Attachment A** is incorporated herein by reference as if
20 fully set forth in this document. Defendants agree to undertake all remedial work set forth in
21 **Attachment A** as follows:

22 (1) Defendants ANTHONY LUKASZEWSKI and MAUREEN
23 LUKASZESKI shall perform the remedial work specified in Paragraphs 1, 2, and 3 of
24 Attachment A, subject to the provisions of Paragraph 7(c) below.

25 (2) Defendants OFELIA ABAYA dba BO'S BARBECUE AND
26 CATERING RESTAURANT and BO MCSWINE shall perform the remedial work specified in
27 Paragraphs 4, 5, 6, and 7 of Attachment A.
28

1 b) Timing of Remedial Work: Defendants will submit plans, if appropriate,
2 for any portion of the remedial work for which they are responsible to the appropriate building
3 department within 30 days of entry of this Consent Decree and Order by the Court. The
4 defendants responsible for the work as more specifically set forth in **Attachment A**, will
5 commence work within 30 days of receiving permit(s) for such work from the building
6 department, and will complete work within 90 days of commencement. For work not requiring
7 building permits, the work will be completed within 30 days of entry of this Consent Decree
8 and Order by the Court, except that such requirement shall not apply to work to be performed
9 by ANTHONY LUKASZEWSKI and MAUREEN LUKASZESKI that, while not requiring
10 building permits, is only reasonably practical to perform after the work that requires building
11 permits is performed.

12 c) It is acknowledged that ANTHONY LUKASZEWSKI and MAUREEN
13 LUKASZESKI have already submitted plans and a building permit application to the City of
14 Lafayette for the work they are to perform pursuant to paragraph 7(a)(1) above, and that the
15 City of Lafayette is requiring that such defendants go through the City's design review process
16 in order to obtain a building permit for such work. It is further acknowledged that the City may
17 not approve the plans as submitted, may require deviations from such plans, or may impose
18 such additional conditions or requirements on these plans which would render these plans not
19 feasible from a use, construction or expense standpoint, all of which matters ANTHONY
20 LUKASZEWSKI and MAUREEN LUKASZESKI may have little influence over. If
21 ANTHONY LUKASZEWSKI and MAUREEN LUKASZESKI in good faith determine that
22 the work that they have agreed to perform pursuant to paragraph 7(a)(1) above needs to be
23 substantially modified, cannot be performed, or is not feasible due to refusals, modifications, or
24 conditions, they will so notify plaintiff's counsel in writing within 15 days of discovering such
25 difficulty, and such parties shall meet and confer in an effort to find a solution acceptable to
26 such parties and the City of Lafayette. In this regard plaintiff acknowledges that his primary
27 goal is assuring full and equal access to the property in question for disabled persons, rather
28

1 than the precise method of achieving such goal. Any of such parties may petition the court
2 with respect to any issues arising by reason of the actions of the City of Lafayette.

3 d) In the event that other unforeseen difficulties, including weather related
4 delays, prevent any defendant(s) from completing any of the agreed-upon remedial work in
5 accordance with the provisions of this paragraph 7, the affected defendant(s) or their counsel
6 will notify plaintiff's counsel in writing within 15 days of discovering the delay or difficulty.
7 Each defendant or their counsel will notify plaintiff's counsel when their portion of the
8 remedial work is completed, and in any case will provide a status report at least once every four
9 months after the date of entry of this Consent Decree and Order until such time as their portion
10 of the remedial work is completed.

11 **DAMAGES, ATTORNEY FEES, LITIGATION EXPENSES, AND COSTS:**

12 8. The parties have not reached an agreement regarding plaintiff's claims for damages,
13 attorney fees, litigation expenses and costs. These issues shall be the subject of further
14 negotiation, litigation, and/or motions to the Court.

15 **ENTIRE CONSENT ORDER:**

16 9. This Consent Decree and Order, including the attachments hereto incorporated
17 herein by reference as if fully set forth in this document, constitutes the entire agreement
18 between the signing parties on the matters of the remedial work, and no other statement,
19 promise, or agreement, either written or oral, made by any of the parties or agents of any of the
20 parties, that is not contained in this Consent Decree and Order shall be enforceable regarding
21 the matters of the remedial work described herein. This Consent Decree and Order applies to
22 plaintiff's claims for injunctive relief only and does not resolve plaintiff's claims for damages,
23 attorney fees, litigation expenses and costs, which shall be the subject of further negotiation
24 and/or litigation.

25 10. Further, the matters agreed to in this Consent Decree and Order shall be without
26 prejudice to any rights, claims or defenses as between the various defendants with respect to
27 plaintiff's claims for injunctive relief, damages, attorneys fees, and costs, or with respect to the
28 costs of or liability for the remedial work contemplated by this Consent Decree and Order.

1 **CONSENT ORDER BINDING ON PARTIES AND SUCCESSORS IN INTEREST:**

2 11. This Consent Decree and Order shall be binding on Plaintiff DERRICK ROSS,
3 Defendants OFELIA ABAYA dba BO'S BARBECUE AND CATERING RESTAURANT; BO
4 MCSWINE; ANTHONY LUKASZEWSKI; MAUREEN LUKASZEWSKI; and any
5 successors in interest to such parties. The parties have a duty to so notify all such successors in
6 interest of the existence and terms of this Consent Decree and Order during the period of the
7 Court's jurisdiction over this Consent Decree and Order.

8 **MUTUAL RELEASE AND WAIVER OF CIVIL CODE SECTION 1542 AS TO**
9 **INJUNCTIVE RELIEF ONLY:**

10 12. Each of the parties to this Consent Decree understands and agrees that there is a
11 risk and possibility that, subsequent to the execution of this Consent Decree, any or all of them
12 will incur, suffer, or experience some further loss or damage with respect to the Lawsuit which
13 are unknown or unanticipated at the time this Consent Decree is signed. Except for all
14 obligations required in this Consent Decree, the parties intend that this Consent Decree apply to
15 all such further loss with respect to the Lawsuit, except those caused by the parties subsequent
16 to the execution of this Consent Decree. Therefore, except for all obligations required in this
17 Consent Decree, this Consent Decree shall apply to and cover any and all claims, demands,
18 actions and causes of action by the Plaintiff, on the one hand, and defendants, on the other
19 hand, with respect to the Lawsuit, whether the same are known, unknown or hereafter
20 discovered or ascertained, and the provisions of Section 1542 of the California Civil Code are
21 hereby expressly waived. Section 1542 provides as follows:

22 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE
23 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER
24 FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN
25 BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER
26 SETTLEMENT WITH THE DEBTOR.

27 This waiver applies to the injunctive relief aspects of this action only and does not
28 include resolution of plaintiff's claims for damages, attorney fees, litigation expenses and costs.
Further, this waiver does not apply to any rights, claims or defenses as between the various
defendants with respect to plaintiff's claims for injunctive relief, damages, attorneys fees, and

1 costs, or with respect to the costs of or liability for the remedial work contemplated by this
2 Consent Decree.

3 13. Except for all obligations required in this Consent Decree, and exclusive of the
4 referenced continuing claims for damages, statutory attorney fees, litigation expenses and costs,
5 plaintiff, on the one hand, and defendants, on the other, on behalf of each, their respective
6 agents, representatives, predecessors, successors, heirs, partners and assigns, releases and
7 forever discharges the other and all officers, directors, shareholders, subsidiaries, joint
8 venturers, stockholders, partners, parent companies, employees, agents, attorneys, insurance
9 carriers, heirs, predecessors, and representatives of the other, from all claims, demands, actions,
10 and causes of action of whatever kind or nature, presently known or unknown, arising out of or
11 in any way connected with the Lawsuit. Such release, however has no application to, and is
12 without prejudice to any rights, claims or defenses as between the various defendants with
13 respect to plaintiff's claims for injunctive relief, damages, attorneys fees, and costs, or with
14 respect to the costs of or liability for the remedial work contemplated by this Consent Decree.

15 **ENFORCEMENT AND TERM:**

16 14. This Consent Decree and Order shall remain in full force and effect for a period of
17 sixty (60) days after plaintiff is notified in writing by defendants that all of the remedial work
18 contemplated by the Consent Decree and Order has been completed and has passed any
19 necessary final inspections by the applicable permitting authorities. Thereafter any defendant
20 may make an application to the Court to have the Consent Decree and Order formally
21 terminated. Plaintiff may oppose such an application only on grounds that the remedial work
22 has not been satisfactorily completed by defendants. Until such termination of the Consent
23 Decree and Order, the Court shall retain jurisdiction of this action to enforce provisions of this
24 Consent Decree and Order. The parties agree that the provisions of this Consent Decree, other
25 than Paragraph 7 and the last sentence of Paragraph 11, shall survive the termination of the
26 Order.

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SEVERABILITY:

15. If any term of this Consent Decree is determined by any court to be unenforceable, the other terms of this Consent Decree shall nonetheless remain in full force and effect.

SIGNATORIES BIND PARTIES:

16. Signatories on the behalf of the parties represent that they are authorized to bind the parties to this Consent Decree and Order. This Consent Decree and Order may be signed in counterparts and a facsimile signature shall have the same force and effect as an original signature.

Dated: ~~November~~ ^{January} 14, 2008



Plaintiff DERRICK ROSS

Dated: November __, 2007

Defendant OFELIA ABAYA dba BO'S
BARBECUE AND CATERING RESTAURANT

Dated: November __, 2007

Defendant BO MCSWINE dba BO'S
BARBECUE AND CATERING RESTAURANT

Dated: November __, 2007

Defendant ANTHONY LUKASZEWSKI

Dated: November __, 2007

Defendant MAUREEN LUKASZEWSKI

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Dated: November __, 2007

Dated: ^{Jan 28} ~~November~~ __, 200~~8~~

Dated: ^{Jan 28} ~~November~~ __, 200~~8~~


Dated: November __, 2007

Dated: November __, 2007

Plaintiff DERRICK ROSS



Defendant OFELIA ABAYA dba BO'S
BARBECUE AND CATERING RESTAURANT



Defendant BO MCSWINE dba BO'S
BARBECUE AND CATERING RESTAURANT

Defendant ANTHONY LUKASZEWSKI

Defendant MAUREEN LUKASZEWSKI

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Dated: November __, 2007

Plaintiff DERRICK ROSS

Dated: November __, 2007


Defendant OFELIA ABAYA dba BO'S
BARBECUE AND CATERING RESTAURANT

Dated: November __, 2007

Defendant BO MCSWINE dba BO'S
BARBECUE AND CATERING RESTAURANT

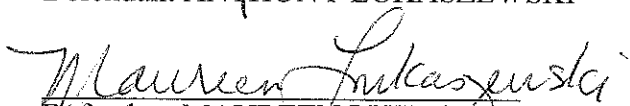
~~Dated: November __, 2007~~

1-16-08


Defendant ANTHONY LUKASZEWSKI

~~Dated: November __, 2007~~

1/16/08


Defendant MAUREEN LUKASZEWSKI

1 APPROVED AS TO FORM:

2 Dated: ~~November~~ __, 2007

3 *January 15, 2008*

PAUL L. REIN
JULIE A. OSTIL
LAW OFFICES OF PAUL L. REIN

Julie Ostil

Attorneys for Plaintiff
DERRICK ROSS

7 Dated: November __, 2007

RICHARD M. MCNEELY
LISA R. ROBERTS
MCNAMARA, DODGE, NEY, BEATTY,
SLATTERY, PFALZER, BORGES &
BROTHERS LLP

Attorneys for Defendants
OFELIA ABAYA AND BO MCSWINE dba
BO'S BARBECUE AND CATERING
RESTAURANT

14 Dated: November __, 2007

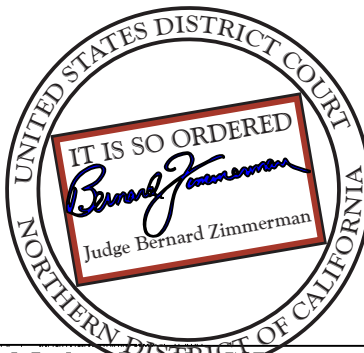
J. SCOTT MCKAY
LAW OFFICES OF J. SCOTT MCKAY

Attorneys for Defendants
ANTHONY LUKASZEWSKI, MAUREEN
LUKASZEWSKI

20 **ORDER**

21 Pursuant to stipulation, and for good cause shown, **IT IS SO ORDERED.**

23 Dated: February 25, 2008



Bernard Zimmerman
HON. BERNARD ZIMMERMAN
U.S. MAGISTRATE JUDGE

1 APPROVED AS TO FORM:


2 Dated: November __, 2007

PAUL L. REIN
JULIE A. OSTIL
LAW OFFICES OF PAUL L. REIN

Attorneys for Plaintiff
DERRICK ROSS

3
4
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6
7 Dated: *Feb 6 2008*
~~November __, 2007~~

RICHARD M. MCNEELY
LISA R. ROBERTS
MCNAMARA, DODGE, NEY, BEATTY,
SLATTERY, PFALZER, BORGES &
BROTHERS LLP

11 
12 Attorneys for Defendants
13 OFELIA ABAYA AND BO MCSWINE dba
14 BO'S BARBECUE AND CATERING
15 RESTAURANT

14 Dated: November __, 2007

J. SCOTT MCKAY
LAW OFFICES OF J. SCOTT MCKAY

17 Attorneys for Defendants
18 ANTHONY LUKASZEWSKI, MAUREEN
19 LUKASZEWSKI

20 **ORDER**

21 Pursuant to stipulation, and for good cause shown, **IT IS SO ORDERED.**

22
23 Dated: _____

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26 HON. BERNARD ZIMMERMAN
27 U.S. MAGISTRATE JUDGE

1 APPROVED AS TO FORM:

2 Dated: November __, 2007

PAUL L. REIN
JULIE A. OSTIL
LAW OFFICES OF PAUL L. REIN

4

5

Attorneys for Plaintiff
DERRICK ROSS

6

7

Dated: November __, 2007

RICHARD M. MCNEELY
LISA R. ROBERTS
MCNAMARA, DODGE, NEY, BEATTY,
SLATTERY, PFALZER, BORGES &
BROTHERS LLP

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Attorneys for Defendants
OFELIA ABAYA AND BO MCSWINE dba
BO'S BARBECUE AND CATERING
RESTAURANT

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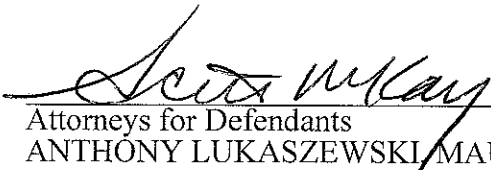
11/16/08
Dated: November __, 2007

J. SCOTT MCKAY
LAW OFFICES OF J. SCOTT MCKAY

15

16

17


Attorneys for Defendants
ANTHONY LUKASZEWSKI/MAUREEN
LUKASZEWSKI

18

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ORDER

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Pursuant to stipulation, and for good cause shown, **IT IS SO ORDERED.**

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Dated: _____

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HON. BERNARD ZIMMERMAN
U.S. MAGISTRATE JUDGE

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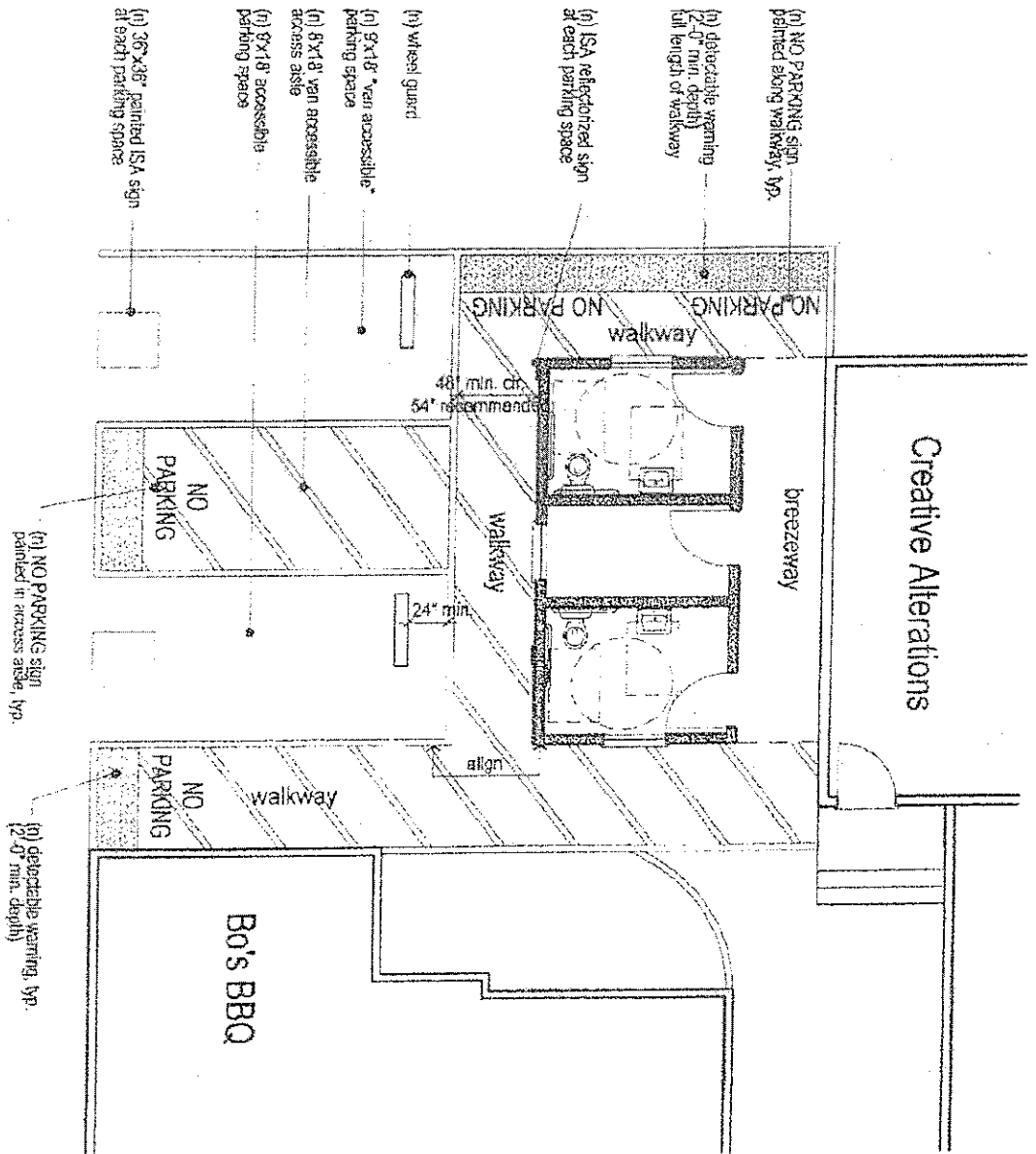
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Consent Decree Attachment A
Ross v. Dudum et al., N. Dist Case No. C07-0888BZ

1. Exterior Path of Travel: Defendants Anthony Lukaszewski and Maureen Lukaszewski will remedy the following issues along the path of travel along the east side of the building that Bo's Barbeque and Catering Restaurant is located in:
 - a. Cross slopes along the walk that exceed 2%.
 - b. Slopes along this path of travel that exceed 5.0%.
2. Exterior Path of Travel: Defendants Anthony Lukaszewski and Maureen Lukaszewski will construct three ramps and one set of stairs along the south side of such defendant's property, as identified by an "(n)" designation on the conceptual plan reflected on page 3 of this Attachment A. All such construction shall be in conformity with such conceptual plan, and meet all accessible requirements as per 2001 CBC and ADAAG.
3. Restrooms and Handicap Parking: Defendants Anthony Lukaszewski and Maureen Lukaszewski will construct the two handicap accessible bathrooms and the two handicap parking spots in conformity with the conceptual plans reflected on pages 2, 3, and 4 of this Attachment A. All such parking and construction shall meet all accessible requirements as per 2001 CBC and ADAAG.
4. Exterior Seating: Defendants Ofelia Abaya, dba Bo's Barbeque and Catering Restaurant, and Bo McSwine will provide the required number of accessible tables (at least 5%, but no less than one) at the exterior dining platform, with at least one table of each type that has the required kneespace underneath the top, and will provide a 36-inch minimum width path of travel through the tables on the exterior dining platform.
5. Dining Counter: Defendants Ofelia Abaya, dba Bo's Barbeque and Catering Restaurant, and Bo McSwine will remove or remount the dining counter on the interior of the restaurant adjacent to the primary entrance door, to a maximum height of 34 inches above the finished floor.
6. Interior Seating: Defendants Ofelia Abaya, dba Bo's Barbeque and Catering Restaurant, and Bo McSwine will provide the appropriate number of accessible tables, with at least one table of each type that has the required kneespace underneath the table and will provide a 36-inch minimum width path of travel through the tables on the interior of the restaurant. The 36-inch clear path of travel through the tables shall connect the entry door and the sales counter with the emergency exit door.
7. Exterior Path of Travel: Defendants Ofelia Abaya, dba Bo's Barbeque and Catering Restaurant, and Bo McSwine will bring down to 5 pounds maximum the push pressure required to open the primary entrance door located on the east side of the building that Bo's Barbeque and Catering Restaurant is located in.

Accessible Parking Plan BO's BBQ - Lafayette, CA



NOTE:
all (n) parking and construction shall meet all accessible requirements as per 2001 CBC and ADAAG.

LEGEND	
	new wall
	existing wall
(n)	new

not to scale

proposed conceptual plan (not for construction)

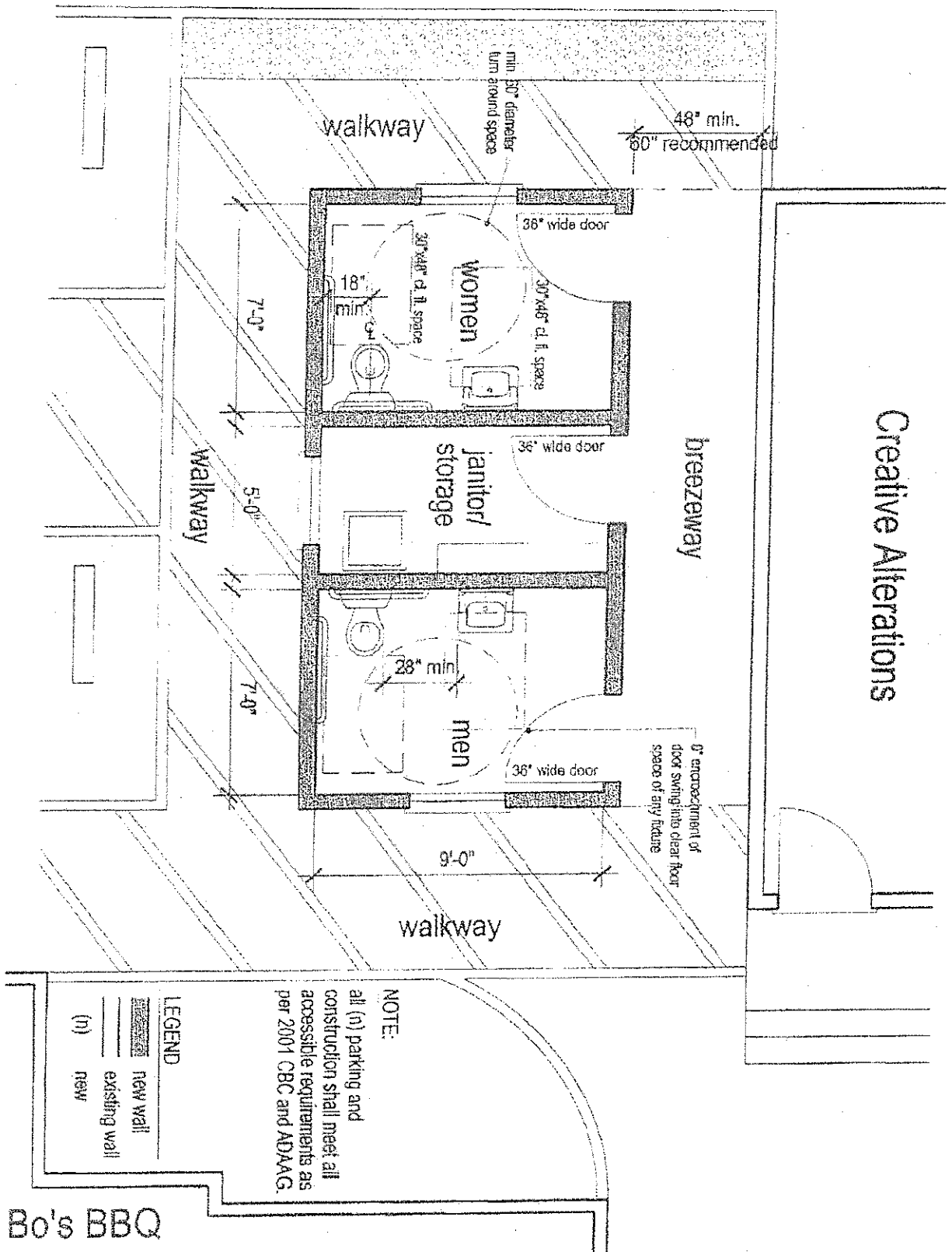
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Creative Alterations

Women's & Men's Single Accommodation Restrooms with Janitor/Storage
BO'S BBQ - Lafayette, CA

proposed conceptual plan (not for construction)

not to scale



Site Plan

BO'S BBQ - Lafayette, CA

proposed conceptual plan (not for construction)

05.24.07

not to scale

MT. DIABLO BLVD.

